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**Ybarra Construction Company and D&P Drywall, Inc., a Single Employer and District Council 22, International Union of Painters and Allied Trades, AFL-CIO, CLC. Case 7-CA-44842**

July 31, 2006

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND KIRSANOW

On September 29, 2004, the National Labor Relations Board issued a Decision in *Ybarra Construction Co.*, 343 NLRB No. 5 (2004). It ordered the Respondent to make employee Alan Kirk whole for lost earnings and benefits resulting from the Respondent's reduction of his hourly wages, diminution in his hours, and his subsequent unlawful constructive discharge.

A controversy having arisen regarding the backpay due to Kirk, the Regional Director for Region 7, on December 9, 2005, issued a compliance specification and notice of hearing specifying the amount of backpay due to Kirk under the Board's Order. On December 30, 2005, the Respondent filed an answer to the specification. In a letter dated January 3, 2006,<sup>1</sup> counsel for the General Counsel advised the Respondent that its answer was insufficient and that failure to file a proper answer by January 10 would result in the filing of a Motion for Summary Judgment.

The Respondent states that it did not receive this letter until January 6 and that it mailed a copy of its amended answer to the General Counsel on January 10. Counsel for the General Counsel states that she never received the amended answer. On January 12, the General Counsel filed a Motion to Transfer Case to and Continue Proceedings before the Board and for Partial Summary Judgment.

On January 20, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause. The Respondent filed a response to the General Counsel's Motion for Partial Summary Judgment and resubmitted its amended answer on January 24. On February 3, the General Counsel filed a reply. The same day the Respondent filed a response to the Notice to Show Cause. On February 14, the General Counsel filed a reply.

<sup>1</sup> All dates below are in 2006, unless otherwise specified.

The Board has delegated its authority in this proceeding to a three-member panel.<sup>2</sup>

On the entire record, the Board makes the following

**Ruling on Motion for Partial Summary Judgment**

Section 102.56(b) and (c) of the National Labor Relations Board's Rules and Regulations states, in pertinent part:

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.* . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Respondent denies the specification's use of base period hours to calculate projected backpay period hours, and the specification's method for determining Kirk's base period hours, wage rates, and interim earnings figures. It also asserts that the specification improperly includes vacation pay in gross backpay and improperly fails to deduct, from gross backpay, unemployment benefits and earnings Kirk may have lost by voluntarily quitting interim employment. The General Counsel argues

<sup>2</sup> This decision is based upon the Respondent's response and answer of January 24 and the subsequent documents from both parties.

that the Respondent's denials are general and hence insufficient under Section 102.56(b), and that the allegations should be deemed admitted to be true by the Board.

1. The specification's use of base period hours to calculate projected backpay period hours

The specification includes the following formula for calculating gross backpay:

An appropriate measure of gross backpay can be determined by obtaining the hours Kirk worked in a one-year period before his hours were reduced, multiplied by the appropriate wage rate and by the number of weeks in each calendar quarter.<sup>3</sup>

Applying this formula, the specification uses hours that Kirk worked during the 1-year base period to project the hours that Kirk would have worked for the Respondent during the backpay period, absent the unfair labor practices.<sup>4</sup>

The Respondent argues that this method is inappropriate due to fluctuations in the availability of work in the construction industry. It argues that the 1-year period cannot be used to project Kirk's backpay period hours due to changes in the availability of work.

Although the Respondent's denial is specific, it is not supported by an alternative formula for calculating gross backpay and therefore does not meet the requirements of Board Rules and Regulations, Section 102.56(b).<sup>5</sup> Accordingly, we grant partial summary judgment regarding the specification's use of the 1-year base period hours to calculate projected backpay period hours.

2. Method for calculating base period hours

The Respondent also challenges the specification's method for calculating Kirk's base period hours.<sup>6</sup> Kirk worked in only 27 weeks of the base year. The specification lists the number of hours that Kirk worked in each of those 27 weekly pay periods. It then totals the hours worked in these 27 pay periods (1023.5), and divides the total hours worked by 27 to yield a figure of 37.91 hours per week.<sup>7</sup> The Respondent argues that base period

hours should be calculated by dividing Kirk's total hours worked (1023.5) by the total number of weeks in the base period (52). This approach yields a figure of 19.69 hours per week.

The Respondent specifically denies the specification's method for calculating Kirk's base period hours, and provides an alternative method to arrive at a base period hours figure of 19.69 hours per week. Because the Respondent's denial fulfills the requirements of Section 102.56(b), we deny summary judgment on the specification's method for calculating base period hours.<sup>8</sup>

3. Wage rates<sup>9</sup>

The Respondent disputes the wage rates used in the specification's gross backpay formula.<sup>10</sup> Although this is a matter within the Respondent's knowledge, it proposes no alternative figures to the wage rates found in the specification. Because the Respondent's denial does not fulfill the requirements of Section 102.56(b), we grant summary judgment on the specification's wage rates.

4. Vacation pay

The specification, in alleging gross backpay, adds \$2-per-hour vacation pay to Kirk's wage rate.<sup>11</sup> The Respondent does not dispute that Kirk would have received this vacation pay but contends that the vacation pay should be excluded in computing gross backpay. We disagree. Paid vacations that a discriminatee would have received during the backpay period are part of gross backpay. See *Continental Insurance Co.*, 289 NLRB 579, 584 (1988); Casehandling Manual (Part Three), Compliance Proceedings, Section 10535.5.<sup>12</sup> We therefore grant summary judgment as to the specification's inclusion of vacation pay in gross backpay.

<sup>3</sup> Specification par. 4(a). This formula is similar to "Formula One" of the Board's Casehandling Manual (Part 3), Compliance Proceedings, Sec. 10532.2, which calculates gross backpay based on the "discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action."

<sup>4</sup> See specification par. 4(b) and schedule B. Par. 5 and schedule C compute the earnings Kirk lost in the period after his hours were reduced; par. 6(a) and schedule D compute the earnings Kirk lost after his constructive discharge.

<sup>5</sup> We reject the Respondent's argument that it cannot submit supporting figures for this denial without records from Kirk. The amount of work available to the Respondent's employees during the backpay period is a matter within the Respondent's knowledge, not Kirk's.

<sup>6</sup> See specification par. 4(b); schedule B.

<sup>7</sup> See specification schedule B.

<sup>8</sup> The General Counsel seeks summary judgment regarding net backpay alleged in the specification for the hours-reduction backpay period, using the 37.91 figure for projected base period hours. As explained above, we deny the General Counsel's Motion for Summary Judgment regarding this 37.91 figure and we accordingly also deny the General Counsel's Motion for Summary Judgment regarding the net backpay for the hours-reduction backpay period. For this same reason, and because the General Counsel does not seek summary judgment regarding net backpay for the discharge backpay period, we do not reach the Respondent's other contentions regarding net backpay issues—that is, interim earnings, self-employment interim earnings, and voluntary quitting of comparable interim employment.

<sup>9</sup> The issues of wage rates, vacation pay, and unemployment compensation (see secs. 3, 4, and 5 herein) relate to the remedies for the pay reduction, the hours reduction, and the discharge.

<sup>10</sup> See specification pars. 4(a), 5, 6(a) and (b), schedule C, and schedule D.

<sup>11</sup> See specification schedules C and D.

<sup>12</sup> We find no merit in the Respondent's contention that the specification would allow Kirk to "double dip" by receiving vacation pay from both the Respondent and interim employers. Vacation pay from interim employment is deducted from gross backpay. Casehandling Manual (Part Three), Compliance Proceedings, Sec. 10535.5.

#### 5. Unemployment compensation benefits

We also reject the Respondent's contention that the specification erred by not deducting unemployment compensation from backpay. State unemployment compensation payments are collateral benefits, not interim earnings, and are not deducted from backpay. *Gullett Gin Co. v. NLRB*, 340 U.S. 361 (1951).

#### ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted as to (1) the specification's use of the base period hours to calculate projected backpay period hours; (2) wage rates; (3) inclusion of vacation pay in gross backpay; and (4) nondeduction of unemployment benefits from gross backpay.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 7 for the

purpose of arranging a hearing before an administrative law judge on the remaining issues.

Dated, Washington, D.C. July 31, 2006

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD